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Supreme Court, U.S.
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IN THE

MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER ----- **Petitioner**

v.

JOHN W. WINGO, WARDEN ----- **Respondent**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

May the Commonwealth delay the trial of an individual for a period of time exceeding five years because of the unavailability of witnesses and not violate that individual's right to a speedy trial?

STATEMENT

The facts and proceedings in the case at bar have been accurately stated by Petitioner.

SUMMARY OF ARGUMENT

The delay of five years between the indictment charging Petitioner with wilful murder and the subsequent trial did not violate his constitutional right to a speedy trial.

Whenever a claim of lack of a speedy trial is raised, several criteria must be examined. The length of the delay must be weighed against the reason for the delay and any prejudice suffered by an accused must be considered. In the case at bar, the Commonwealth's legitimate delay was based on the unavailability of two key witnesses. The Commonwealth proceeded with all due diligence and trial was had at the first term of court when both witnesses were available. When this reason for the delay is balanced against the fact that Petitioner did not suffer any prejudice by virtue of the delay, it is apparent that Petitioner's right to a speedy trial was not violated.

ARGUMENT

I.

THE DELAY OF FIVE YEARS BETWEEN INDICTMENT AND TRIAL DUE TO THE UNAVAILABILITY OF WITNESSES IN THE CASE AT BAR DID NOT VIOLATE PETITIONER'S RIGHT TO A SPEEDY TRIAL.

Facing this Court is the decision of whether or not there is any sufficient justification for delaying the trial of an individual for a long period of time. There cannot be a solid, inflexible rule that a person accused of a crime must be tried within a specified length of time. For example, there is authority for the proposition that a person cannot sustain a speedy trial claim where the delay results from his being a fugitive from justice, dilatory pleadings or motions on the accused's behalf, or from a delay caused by his incompetence to stand trial. See e.g. *Dickey v. Florida*, 398 U. S. 30 (Concurring opinion, Justice Brennan); *United States v. Davis*, 365 F.2d 251, 255 (C.A. 8th 1966).

The delay in the case at bar was based solely on the fact that witnesses were unavailable. *Silas Manning*, Petitioner's accomplice, was the main witness for the Commonwealth. Without his testimony, *Barker* would not have been convicted. However,

Manning was not available to testify¹ until after his legal processes were completed. Manning's final trial was in December of 1962 and the Commonwealth set trial for the next available term of court. However, when the case was called for trial, Sheriff *Harold McKinney*, the investigating officer, was suffering from a serious illness and he was unavailable for testimony². Therefore, the case was continued until such time as Sheriff *McKinney* recovered and trial was held at the first available term of court after such recovery.

There is authority for the proposition that the unavailability of a witness is sufficient reason to justify delayed prosecution of an accused. *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (C.A.2nd 1963); *Oden v. United States*, 410 F.2d 103 (C.A.5th 1969), cert. denied 396 U. S. 839 and 863. The Commonwealth submits that unavailability of a witness is a justifiable reason for delaying a trial.

The delay and reason for it must be balanced against the resulting prejudice, if any, against the accused. If the delay, even though occasioned by justificatory reasons, results in substantial prejudice to the accused, then the scales have been tipped against the government and absent some extremely important circumstance, the accused should be entitled to a dismissal of the indictment. The important question is what constitutes substantial prejudice? The first and probably foremost example that occurs to the Commonwealth is loss of witnesses. See e.g. *Dickey v. Florida*, 398 U. S. 30. If one loses witnesses upon whom his defense is based, surely he has been substantially prejudiced. In the case at bar, Petitioner lost no witnesses. Next, a delay in trial might result in a mnemonic loss. However, Petitioner's witnesses testified with conviction and without any apparent loss of memory. 442 F.2d 1141, at 1143, 1144. Also if the

¹ Affidavit of Manning's counsel stating that Manning would invoke self-incrimination privilege, Transcript of Record, pp. 17, 18.

² Harold McKinney's affidavit describing his illness is on Transcript of Record, pp. 14, 15.

accused was incarcerated for a long period preceding his trial, substantial prejudice might result. In the case at bar, Petitioner was incarcerated for eight and one-half months and for the remaining period he was released on bond. There are various other circumstances which very well might result in prejudice to an accused, but in the case at bar, Petitioner suffered no substantial loss or prejudice. Indeed, the only possible prejudice that Petitioner could have sustained was the fact that he was charged with a crime and the community was aware of this. No such allegation is affirmatively pleaded by Petitioner.

There are four factors to be considered in any speedy trial question: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver, if any. *United States v. Perez*, 398 F.2d 658 (C.A. 7th 1968). All of these factors must be considered and applied to the facts in each individual case. The right to a speedy trial is necessarily relative, and, it is consistent with delays and depends upon circumstances. *United States v. Ewell*, 383 U. S. 116, 120. There have been many cases holding that legitimate delays for lengthy periods of time do not constitute a violation of one's right to a speedy trial. See e.g. *United States v. Ewell*, 383 U. S. 116; *Von Feldt v. United States*, 407 F.2d 95 (C.A. 8th 1969); *Sims v. United States*, 405 F.2d 1381 (D.C.Cir. 1968); *United States v. Capaldo*, 402 F.2d 821 (C.A. 2nd 1968), cert. denied 394 U. S. 989; *United States v. Peacock*, 400 F.2d 992 (C.A. 6th 1968), cert. denied 393 U. S. 1025 and 1040; *United States v. Kaufman*, 393 F.2d 172 (C.A. 7th 1968), cert. denied 393 U. S. 1098; *United States ex rel. Von Gseh v. Fay*, 313 F.2d 620 (C.A. 2nd 1963).

Another important factor to be considered is whether or not the government deliberately delayed the trial either in an attempt to gain an unfair advantage over the defendant or for some other reason. See e.g. *Dickey v. Florida*, 398 U. S. 30 at 43 (Concurring opinion, Justice Brennan). This is obviously not a factor in the case at bar. *Barker* was brought to trial at the first term of court when all witnesses were available. One has but to look at the

Manning trials to realize the diligence with which the Commonwealth pursued this case. Not one term of court passed between *Manning's* indictment and final trial that he did not have a trial or an appeal pending. There was no lack of diligence by the Commonwealth in prosecuting either *Barker* or *Manning*.

Petitioner makes much of the reference in the opinion below to his failure to demand trial during the greater part of the delay and urges that this case is an appropriate occasion for reconsideration of the demand rule. Respondent submits that it presents no such occasion. The entire delay was due to the unavailability of material witnesses and there is no showing of prejudice. Even if petitioner had demanded trial immediately following indictment, the same period of delay and the same reasons for the delay would still be present. Respondent submits that the reason occasioning the delay would have been justifiable no matter when the demand for trial was made.

The public has a right to effective prosecution of criminal cases. *Ponzi v. Fessenden*, 258 U. S. 254, 264 (1922). In this case the interests of society must be weighed against Petitioner's right to a speedy trial, and when this is done in consideration with the fact that the government pursued due diligence, the delay was legitimate and *Barker* suffered no prejudice, it is apparent that justice was had by all.

CONCLUSION

Whereas the Petitioner, *Willie Mae Barber*, has suffered no violation of his constitutional right to a speedy trial, the decision of the lower court was correct and should be affirmed.

Respectfully submitted,

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